In the Supreme Court
OF THE
United States

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OCTOBER TERM, 1980

BAXTER RICE, Director, Department of Alcoholic Beverage Control of the State of California,
Petitioner,
vs.
NORMAN WILLIAMS COMPANY, et al.,
Respondents.

BOHEMIAN DISTRIBUTING COMPANY,
Petitioner,
vs.
NORMAN WILLIAMS COMPANY, et al.,
Respondents.

WINE & SPIRITS WHOLESALERS OF CALIFORNIA, a California corporation,
Petitioner,
vs.
NORMAN WILLIAMS COMPANY, et al.,
Respondents.

On Petitions for Writ of Certiorari to the Court of Appeal of the State of California Third Appellate District

REPLY TO AMICUS CURIAE BRIEF OF THE UNITED STATES

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Nos. 80-1012, 80-1030, 80-1052

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I
INTRODUCTION

The Amicus Brief of the United States offers this Court several alternatives for disposing of this matter. Those alternatives are presented against the background of several assumptions made by the United States, including: (1) the case is not important nationally; (2) the heart of the controversy could disappear if the Oklahoma Supreme Court rules on a pending appeal in a way that cuts off the supply of liquor to the Respondents, (3) the statute serves no legitimate state interest that could justify restraints in violation of the Sherman Act and (4) the California decision that the Sherman Act would be violated was wrong in light of *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977).

The last assumption is incorrect. The case was correctly decided and is not in derogation of *Sylvania*. More importantly to this Court in considering the petition, the other three assumptions *are* correct. First, the California designation statute (Cal. Stats. 1979, Ch. 280 § 1 amending Cal. Bus. & Prof. Code § 23672 referred to hereinafter as "A.B. 499") *is* sui generis. (See U.S. brief at p. 20, fn. 8) Second, if in a matter pending before it the Oklahoma Supreme Court interprets its law to permit distillers to refuse to sell to Oklahoma wholesalers who resell to out-of-state wholesalers and if that interpretation is not disturbed, the ruling from which petitioners seek relief will be of little practical significance even in California. Third, while the U.S. speculates about the existence of a state interest, it recognizes that such an interest would not be such as to overcome the effect of a violation of the Sherman Act.

II

DISCUSSION

Because the result below does not disturb the principles of *Sylvania,* the Court need not and should not grant the petition. Even if there is doubt about the reach of *Sylvania,* the Court should resolve that doubt in a case that is of more than contingent significance even to the parties and where it has application to something more than a statutory scheme peculiar to California.

The United States takes the position that *Sylvania* establishes a rule of reason for vertical restraints and that A.B. 499 facilitates nothing more. Accordingly, the U.S. argues that A.B. 499 must be judged under a rule of reason and there can be no *per se* conflict between the state statute and the Sherman Act.

Contrary to the brief of the U.S., if anything is "plainly incorrect," it is the contention that A.B. 499 facilitates only a *Sylvania*-type restraint. As Respondents pointed out in their Consolidated Brief in Opposition ("Opposition") (pp. 8-17), the restriction inherent in A.B. 499 is not a restriction imposed by a single distiller upon his own franchisees. Rather, the statute would empower distillers and their franchisees to prohibit commerce between two third parties whose source of liquor is independent of the franchise system. Put another way, under the statute interstate commerce in goods that already have moved beyond a franchise system would be the subject of a naked restraint imposed by distillers and their franchisees.

The California court looked at the purpose, effect and pervasiveness of the restraint, rather than depending upon

a metaphysical determination of that restraint as "vertical" or "horizontal" and concluded that the restraint should be prohibited *per se*. That conclusion was correct as to a statute that would restrain trade each time it was invoked by any distiller.

The state court implicitly found that the statute would have a tendency to raise prices by eliminating the discounting wholesalers and accordingly found that it was *anti*-competitive. The United States at least agrees that A.B. 499 is intended to negate the effect of an Oklahoma law, namely, the requirement that distillers sell to all comers. (See U.S. Brief at p. 18)

The purported "competitive advantages" of the statute never have been identified, either by the United States or elsewhere. The question still remains: what procompetitive benefit does the statute have which possibly could outweigh its tendency to increase prices and reduce the number of competitors who would exist in a free market.

Respondents have pointed out that A.B. 499 carries none of the benefits usually associated with *Sylvania*-type restrictions. (Opposition pp. 15-17) While *Sylvania* found that vertical restrictions may encourage franchisees to provide warranty services, that supposed benefit has no application here. Moreover, the tendency of *Sylvania* restrictions to encourage advertising by franchisees provides no argument for a benefit since the justification for liquor regulation is to encourage temperance rather than advertising. As this Court has held, a *per se* rule should be applied to practices which nakedly restrain trade without any countervailing benefits. A.B. 499 clearly falls into this category.

We turn from the anti-trust violation inherent in the statute to whether there was a Twenty-first Amendment salvation in the form of a valid state regulatory purpose. Private interest groups conjured up a number of possible interests and offered them in argument to the judicial system of California. The California courts decided correctly there was no such interest. It is curious that the United States hypothesizes "competitive advantages" (Amicus Brief p. 19, fn. 17) for a regulatory measure for which the state's court could find no purpose.

In any event, this Court last term in *California Retail Liquor Dealers Assn. v. Midcal,* 455 U.S. 97, 103-106 (1980) set the guidelines for determining when the Sherman Act should preempt state liquor laws. Having set these guidelines, this Court can now allow the lower courts to apply them and consider the issue again only if a clear conflict develops between the lower courts. Conflict with other states is not presented here because of the uniqueness of the California statute.

III
CONCLUSION

The Amicus Brief of the United States is helpful in placing the dispute advanced by the instant petitions in its proper perspective. The result below is consistent with this Court's decision in *Sylvania*. As the United States observes, a Sherman Act violation of the type found by the California courts is not shielded by the Twenty-first Amendment because neither the executive nor the judicial branch of California government has been able to identify a valid State purpose. For all of these reasons, the petitions should be denied.

Dated: September 24, 1981

Respectfully submitted,

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